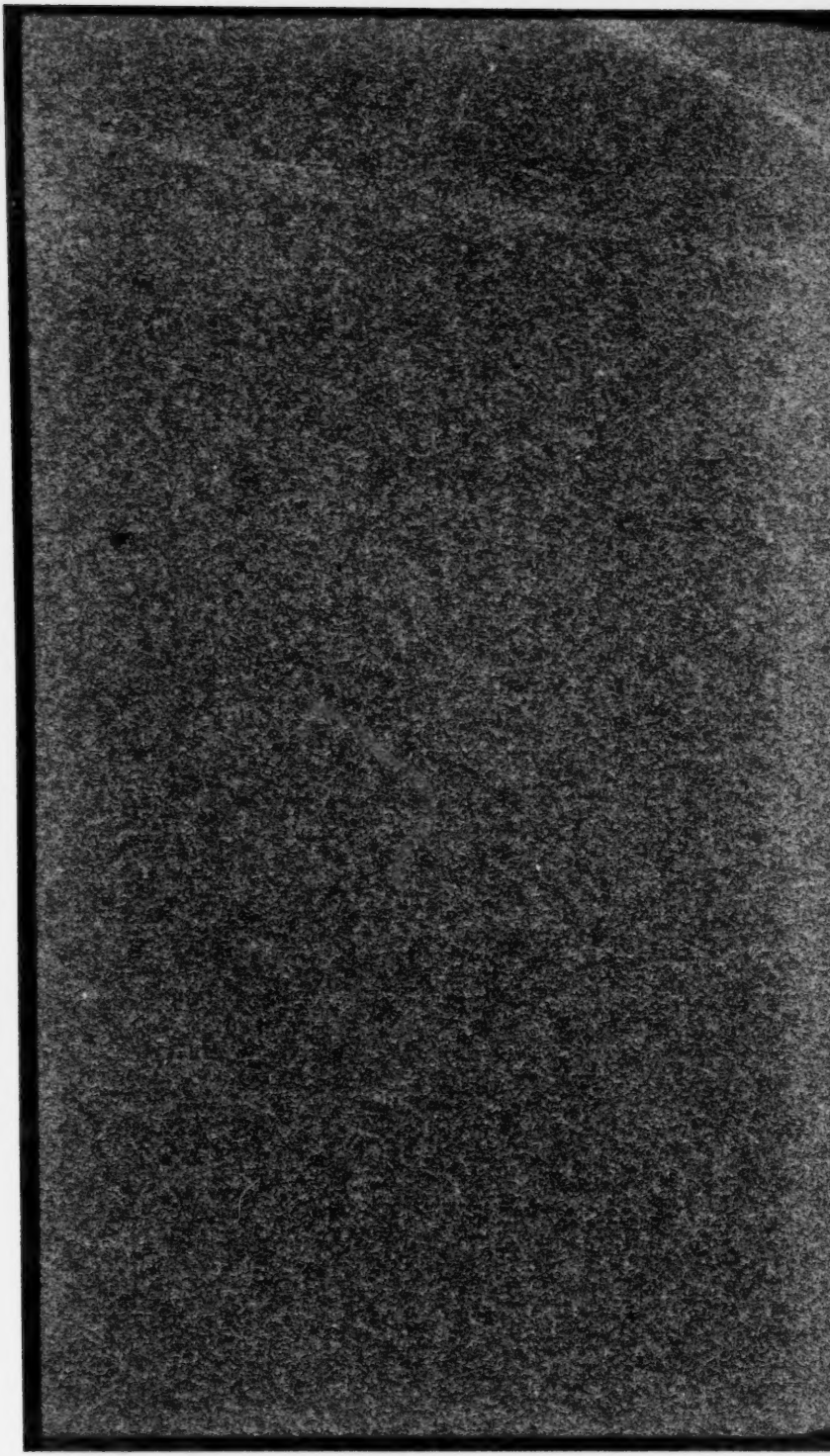

INDEX

CASES CITED

STATUTES CITED

TEXTBOOKS CITED

In the Supreme Court of the United States

OCTOBER TERM, 1925.

No. 307

ED. RAFFEL

v.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

This case is not reported below. The companion case of *Abramson* v. *The United States*, referred to by the court in its statement, is reported in 2 F. (2nd) 595.

STATEMENT

At the beginning of the brief for plaintiff in error it is stated:

> Understanding, however, that it is permissible practice to have the entire record of the case, as certified from the District Court to the Appellate Court, filed in this Court and in anticipation of causing it to be so filed, we wish to quote the entire colloquy * * *, etc.

And thereafter, on page 5 of the brief, are set forth portions of the argument of the United States Attorney at the trial. We do not understand that such practice is allowable in the absence of an order of this Court requiring the entire record to be certified. It tends, however, to confirm the view which we have advanced at the end of this brief, that the question certified is hardly such a one as should be certified, but rather a matter to be decided by the Circuit Court of Appeals upon consideration of the entire case. We confine our discussion to the case as certified.

On February 2, 1925, the Circuit Court of Appeals for the Sixth Circuit certified to this Court a question under section 239 of the Judicial Code. (R. 1.) From the statement of facts it appears that Raffel, with others, was indicted for conspiracy to violate the National Prohibition Act. Upon the first trial the prohibition agent testified that, after the raid, Raffel admitted that the drinking place raided belonged to him. (R. 1.) Raffel was not sworn and the jury disagreed. Upon the second trial the prohibition agent gave similar testimony. Raffel took the stand and denied making any such statement. Thereupon, after admitting that he was present at the former trial and that the same prosecuting witness then testified to the same story now repeated, Raffel was asked by the court:

> Q. Did you go on the stand and contradict anything they said?
>
> A. I did not.

Q. Why didn't you?

A. I did not see enough evidence to convict me.

Defendants object to the questions of the Court.

The COURT: I am not commenting; I am just asking why he didn't.

Defendants excepts.

The COURT: That is so?

The WITNESS: I did not think there was enough evidence to do it.

By Raffel's Counsel:

Q. The failure to take the stand on the trial was under the advice of counsel, was it not?

A. Yes sir. (R. 1.)

The court further certifies that in the companion case of *Abramson* v. *The United States*, by opinion filed December 8, 1924 (reported 2 F. (2nd) 595), "we have decided what we think the only substantial question presented by the record, except the one arising from the subject matter just stated. The case must therefore be affirmed, unless there was error in this respect; and we have decided to certify this remaining question." (R. 1 and 2.)

The question certified is, "Was it error to require the defendant, Raffel, offering himself as a witness upon the second trial, to disclose that he had not testified as a witness in his own behalf upon the first trial?"

SUMMARY OF ARGUMENT

The principle involved is that of the scope of legitimate cross-examination.

By taking the stand the defendant waived his privilege of silence and the immunity incidental thereto, and became subject to cross-examination like any other witness, including cross-examination upon matters tending to affect his credibility.

The questions asked the defendant were within the limits of proper cross-examination, for they had a bearing upon the credibility of his testimony.

ARGUMENT

I

WHEN A DEFENDANT IN A CRIMINAL CASE TAKES THE STAND IN HIS OWN BEHALF HE BECOMES SUBJECT TO CROSS-EXAMINATION LIKE ANY OTHER WITNESS

Any difficulty in answering the question is removed when the principle which should govern is discovered and placed in its true relation to other principles with which it has some times been confused. The question does not involve the constitutional privilege against self-incrimination guaranteed by the Fifth Amendment or the admissibility of a confession or admission. The principle to control here is that of the proper limit of cross-examination of an accused person who has voluntarily taken the witness stand in his own behalf, pursuant to the provisions of the Act of March 16, 1878, c. 37, 20 Stat. 30, which provides:

> That in the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors, in the United States courts, Territorial courts, and courts-martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him.

The principle was clearly stated by Circuit Judge David J. Brewer in *United States* v. *Mullaney*, 32 Fed. 370. The defendant had been convicted of forging the registration of electors. The case reported was in the Circuit Court upon writ of error to the District Court. The defendant had gone upon the witness stand and been asked the single question whether he wrote certain names in the registration book. He answered that he did not. The Government on cross-examination called upon him to take a pen and write in the presence of the jury the names. To that he objected. The court overruled the objection, he wrote the names, and when he had finished his defense the Government, in rebuttal, offered the names thus written by him. The writing was admitted in evidence and the jury were permitted to compare it with the writing in the registration book.

The question presented was argued under two aspects, first, that it was not legitimate cross-examination of a witness who has simply testified that he did

not make a writing; and, second, that it was compelling him to furnish testimony against himself in violation of constitutional protection.

In holding that no error had been committed, Judge Brewer said, at page 370:

> I think really there is but one question, and that is whether it was legitimate, in the cross-examination of a witness who gave such direct testimony as he did, to compel him to so write in the presence of the jury. For while a defendant in a criminal case can not be compelled to give testimony against himself, while he may not be put upon the stand against his will, yet if he avails himself of the privilege, and goes onto the witness stand, and testifies in his own behalf, he subjects himself to the ordinary rules of cross-examination, and, if this was legitimate cross-examination, then he can not be heard to say that by it he furnished testimony against himself. He may be impeached in any way that any other witness can be. Of course, cross-examination is, in the federal courts, limited to the matter of the direct examination, and can not extend beyond the facts and circumstances which are a part of or connected directly with the subject-matter of the direct testimony.

Judge Brewer held that it was proper cross-examination and concluded with these words:

> Taking this question in either one of the two phases, as to whether the matter was connected with the subject-matter of the direct testimony, or whether in the act,—the

> physical act which he was called upon to do,—there was any invasion of his rights, I am clearly of the opinion there was no error in the ruling of the district court, and that the testimony was legitimate cross-examination. The judgment of the district court will be affirmed.

The question, then, is one of proper cross-examination. But the decided cases have sometimes confused the question of what is proper cross-examination with what has been waived by the defendant when he takes the stand. And the question has further been confused by the different rules governing cross-examination prevailing in different jurisdictions. A full discussion of the subject may be found in *Wigmore on Evidence*, 2nd Edition, Secs. 2272–2277.

In *Wharton's Criminal Evidence*, 10th edition, sec. 429, the rule is stated as follows:

> The common law incompetency of the accused was based on his interest in the matter. The statute removes this disqualification. Then, where the accused becomes a witness, on principles of logic he should not be classed differently from any other witness. Hence, unless otherwise provided by statute, he is subject to the usual duties, liabilities, prerogatives, and limitations of witnesses. * * * [He may be asked on cross-examination] generally, as to all matters that go to affect his credibility.

Professor Wigmore, discussing the subject of waiver, reaches the following conclusion (*Wigmore on Evidence*, 2nd ed., vol. 4, sec. 2276):

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> The result is, then, that the accused, as to all facts whatever (except those which merely impeach his credit and therefore are not related to the charge in issue), has signified his waiver by the initial act of taking the stand. Moreover, the spirit and the purpose of the privilege (*ante*, § 2251) can not be violated by any questioning after the accused has once voluntarily taken the stand; and the nice distinctions attempted by Court are needless.

The author draws a distinction between his status as an *accused*, and his status as a *witness;* between the *propriety* of questions and the *privilege* not to answer them. As a *witness* he is "open to impeachment like any other witness." (Sec. 2277.) He points out how the two questions tend to become confused. His conclusion seems to be justified by the decisions of this Court and the other Federal courts, though the distinction drawn by Professor Wigmore is not always observed. *Spies* v. *Illinois*, 123 U. S. 131; *Fitzpatrick* v. *United States*, 178 U. S. 304; *Powers* v. *United States*, 223 U. S. 303; *Caminetti* v. *United States*, 242 U. S. 470; *LeMore* v. *United States*, 253 Fed. 887; *Gordon* v. *United States*, 254 Fed. 53; *Austin* v. *United States*, 4 F. (2nd) 774; *Tucker* v. *United States*, 5 F. (2nd) 818.

In *Sawyer* v. *United States*, 202 U. S. 150, a murder case, the accused took the stand and was cross-examined with respect to his conduct on a previous voyage and on a different vessel in regard to which

nothing had been said on examination in chief. This Court said, at page 165:

> It has been held in this court that a prisoner who takes the stand in his own behalf waives his constitutional privilege of silence, and that the prosecution has the right to cross-examine him upon his evidence in chief with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the crime. *Fitzpatrick* v. *United States*, 178 U. S. 304.

In *Fitzpatrick* v. *United States*, 178 U. S. 304, a murder case, this Court said, at page 315:

> Where an accused party waives his constitutional privilege of silence, takes the stand in his own behalf, and makes his own statement, it is clear that the prosecution has a right to cross-examine him upon such statement with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the alleged crime. While no inference of guilt can be drawn from his refusal to avail himself of the privilege of testifying, he has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts. The witness having sworn to an alibi, it was perfectly competent for the government to cross-examine him as to every fact which had a bearing upon his whereabouts upon the night of the murder, and as to what he did and the persons with whom he associated that night. Indeed, we know of no reason why an accused

> person, who takes the stand as a witness, should not be subject to cross-examination as other witnesses are. Had another witness been placed upon the stand by the defense, and sworn that he was with the prisoner at Clancy's and Kennedy's that night, it would clearly have been competent to ask what the prisoner wore, and whether the witness saw Corbett the same night or the night before, and whether they were fellow occupants of the same room. While the court would probably have no power of compelling an answer to any question, a refusal to answer a proper question put upon cross-examination has been held to be a proper subject of comment to the jury, *State* v. *Ober*, 52 N. H. 459; and it is also held in a large number of cases that when an accused person takes the stand in his own behalf, he is subject to impeachment like other witnesses.

In *LeMore* v. *United States*, 253 Fed. 887, C. C. A. 5th Circuit, an indictment for using the mails to defraud, the court said, at page 897:

> The plaintiff in error having voluntarily offered himself as a witness, the waiver of his constitutional privilege was complete, and the extent and latitude of the cross-examination was a matter for the discretion of the District Judge.

In *Gordon* v. *United States*, 254 Fed. 53, C. C. A. 5th Cir., it was held that where the accused took the stand he should be impeached like any other witness by proof of his prior conviction of an offense which

the Penal Code made a felony. The Court said, at page 54:

> When, however, the defendant in a criminal trial in a United States court takes the stand as a witness in his own behalf, he does so at his own election, and, by the federal practice, as a witness he becomes subject to all the rules and tests applicable to any other witness, and to test his credibility he may be interrogated as to all matters affecting his credibility. He may be impeached, like any other witness, by proving that he has been convicted of a felony; the punishment provided in the statute for the offense of which the plaintiff had previously been convicted made it a felony.

In *Austin* v. *United States*, 4 F. (2nd) 774, C. C. A. 9th Cir., prosecution for using the mails to defraud, the court said, at page 775:

> The testimony of the plaintiff in error, while brief, was to the effect that he was a mere agent or solicitor, and not the principal, in the transaction complained of; but this testimony, brief as it was, opened up the entire case, because all of his activities had a material bearing upon that issue.

In *Tucker* v. *United States*, 5 F. (2nd) 818, C. C. A. 8th Cir., prosecution for using the mails to defraud, the court stated the rule to be that (p. 822):

> * * * when a defendant in a criminal case voluntarily becomes a witness in his own behalf, he subjects himself to cross-examination and impeachment to the same extent as any other witness in the same situation, but he

> does not subject himself to cross-examination and impeachment to any greater extent.

Though the court reversed the judgment holding that the rule had been misapplied, the rule itself was not questioned.

In *State* v. *Larkin and Harris*, 250 Mo. 218, in overruling *State* v. *Graves*, 95 Mo. 510, which had held that counsel for the State might not comment upon the failure of the defendant when a witness to testify upon any fact in issue or to deny any fact testified to by another witness, discusses the whole question at length and finds the rule to be universal (except in Missouri and in California where it is subject to some doubt) that if a defendant becomes a witness "he then stands in the precise attitude of any other witness." (p. 239.) The court said, at page 240:

> The contention that, absent a statute such as we have, cross-examination is limited by the constitutional rule against self-incrimination, has been exploded utterly on the ground that there is sufficient protection against self-incrimination, when it is provided that a defendant may, or may not, testify for himself, according as he may desire. If he desires to save himself from cross-examination he may do so by refusal, failure or neglect to become a witness for himself. * * * The defendant waives the right of protection against self-incrimination by electing to become a witness for himself; so becoming a witness he may be cross-examined by the State, in the absence

> of a statute, to any extent, whether his answers may tend to convict him or not.

The rule is stated in *People* v. *Brown*, 203 N. Y. 44, a murder case, as follows, at page 49:

> The defendant, in exercising his right to become a voluntary witness on this trial, subjected himself to all the rules under which the testimony of witnesses may be probed by cross-examination. (*People* v. *Hinksman*, 192 N. Y. 421, 432.) The district attorney had the right to test the truth and accuracy of his statements, made as a witness upon the trial, by eliciting any other statements previously made either as a witness in some prior proceeding or otherwise.

(The statements in that case were made at a coroner's inquest.)

II

THE QUESTIONS ASKED THE APPELLANT WERE WITHIN THE LIMITS OF PROPER CROSS-EXAMINATION

The Government witness, having sworn that the accused had admitted to him that he was the owner of the drinking place which had been raided, and the accused having denied making such a statement, was asked questions tending to show that on a previous occasion, when the same incriminating statements were made, he had not denied them. Within the principles of the cases already cited, the questions were proper. Four state cases identical in principle, sustaining the propriety of such examination, are

Commonwealth v. *Smith*, 163 Mass. 411; *People* v. *Prevost*, 219 Mich. 233; *Taylor* v. *Commonwealth*, Kentucky Court of Appeals, 34 S. W. 227 (not officially reported), and *Sanders* v. *The State*, 52 Tex. Crim. Rep. 156.

In the case of *Commonwealth* v. *Smith*, 163 Mass. 411, it was held that a person under indictment who, at his trial, testifies in his own behalf, may be asked on cross-examination, for the purpose of affecting his credit, whether, when a witness before the grand jury investigating the same matter, he did not decline to testify on the ground that he might incriminate himself.

The Massachusetts statute quoted by the Court as applicable, Public Statutes, [1882] c. 169, Sec. 18, cl. 3, read:

> In the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offenses, a person so charged shall, at his own request, but not otherwise, be deemed a competent witness; and his neglect or refusal to testify shall not create any presumption against him.

This statute does not differ materially from the Federal Act already quoted.

The court, after pointing out that it was the constitutional right of the several defendants, when testifying before the grand jury, to refuse to answer questions upon the ground that they might thereby criminate themselves, and quoting the Massachusetts Statute, discussed at considerable length and with

the citation of numerous authorities, the constitutional privilege against self-incrimination, showed that the protection of the statute could be waived and that if one under indictment avails himself of the statute allowing him to testify and voluntarily becomes a witness in his own behalf, "he takes an oath to tell the whole truth and may be cross-examined like other witnesses." Taking up the specific claim that his refusal to answer before the grand jury was a fact of no probative force against him, being merely an assertion of his constitutional right, and that by testifying afterwards he did not waive the protection of the Constitution as to that fact, the court said at page 432:

> We are unable to assent to either of these views. We have no occasion at this time to enter upon the consideration of the question whether such refusal to answer could have any legitimate bearing upon the general question of the guilt or innocence of the accused; that is, whether it could be regarded as in the nature of an implied admission of guilt. The presiding judge in his instructions to the jury expressly excluded this view, and limited the effect of the refusal to its bearing upon the credit to be given to the witness. He ruled in effect that, where a defendant now testifies that he is innocent of a criminal charge, the fact that he has heretofore refused to answer in relation to the subject on the ground that his answers might tend to criminate him may be considered as bearing upon the credibility of his present testimony. The

> defendant in such case now says that he is innocent. He formerly did not say that he was innocent, but that he would not answer lest he might criminate himself. This fact, though open to explanation, has some tendency to throw a doubt upon the truth of his present testimony, and thus has some bearing upon one material question, namely, the truthfulness of the witness.
>
> Nor can we assent to the doctrine that the waiver by the defendant of his constitutional protection is only partial. By becoming a witness, he throws away his shield. He voluntarily accepts the position, and requests the privilege of testifying in his own behalf. If he remains silent, the law jealously guards and preserves his rights, cuts off all injurious comments, and as far as possible protects him from unfavorable inferences. *Commonwealth* v. *Harlow*, 110 Mass. 411. *Commonwealth* v. *Maloney*, 113 Mass. 211. *Commonwealth* v. *Nichols*, 114 Mass. 285, 287. *Emery's case*, 107 Mass. 172. *Commonwealth* v. *Scott*, 123 Mass. 239. *Commonwealth* v. *Hanley*, 140 Mass. 457. If, however, he seeks the benefit of testifying, he can not stop short with matters which are favorable to himself, but must submit to be questioned also as to relevant matters which are adverse.

In *People* v. *Prevost*, 219 Mich. 233, the defendant had been convicted of murder. It appeared during the taking of the testimony of the prosecution that there had been a so-called "John Doe" proceeding, an examination after defendant's arrest, and an

inquest, at which the defendant had not testified. This was claimed to be error under a statute of Michigan, 3 Comp. Laws, 1915, c. 12,552, which made the defendant a competent witness at his own request, but provided that "his neglect to testify shall not create any presumption against him, nor shall the court permit any reference or comment to be made to or upon such neglect." (It may be noted that the evidence was obtained, not from the defendant upon cross-examination, but from other witnesses as part of the State's case—a difference which does not affect the principle, though it would seem that the evidence would have been incompetent if the defendant had not made it competent by taking the stand.) In overruling this claim the court said, at page 237:

> Much time has been devoted to this question and many cases cited, but we are not impressed with the importance of the question, because of the fact that defendant took the stand and testified on the trial in his own behalf. When he did this he waived any benefit which he may have been entitled to under the statute, and was then subject to precisely the same cross-examination as any other witness.

In support of this conclusion the court cited a number of Michigan decisions and also quoted from *Underhill on Criminal Evidence* (2d Ed.), Sec. 68, as follows:

> "The exemption from unfavorable comment is applicable only when the accused wholly

refrains from testifying. If he voluntarily goes upon the stand, he waives this exemption, and the State may comment upon his testimony as fully as upon that of any other witness, and may call attention to his silence and demeanor while there, or at the preliminary examination, to his refusal to answer incriminating questions; or to deny prominent and damaging facts of which he must have some personal knowledge," citing *Russell* v. *State*, 77 Neb. 519 (110 N. W. 380, 15 Ann. Cas. 222); *Comstock* v. *State*, 14 Neb. 205 (15 N. W. 355); *Solander* v. *People*, 2 Colo. 48; *State* v. *Anderson*, 89 Mo. 312 (1 S. W. 135); *Cotton* v. *State*, 87 Ala. 103 (6 South. 372); *Lee* v. *State*, 56 Ark. 4 (19 S. W. 16); *State* v. *Walker*, 98 Mo. 95 (9 S. W. 646, 11 S. W. 1133); *State* v. *Tatman*, 59 Iowa, 471 (13 N. W. 632); *State* v. *Ober*, 52 N. H. 459 (13 Am. Rep. 88); *Brashears* v. *State*, 58 Md. 563; *Toops* v. *State*, 92 Ind. 13; *Stover* v. *People*, 56 N. Y. 315; *Commonwealth* v. *Mullen*, 97 Mass. 545; *Commonwealth* v. *McConnell*, 162 Mass. 499 (39 N. E. 107); *Heldt* v. *State*, 20 Neb. 492 (30 N. W. 626, 57 Am. Rep. 835); *State* v. *Ulsemer*, 24 Wash. 657 (64 Pac. 800); *Taylor* v. *Commonwealth*, 17 Ky. Law Rep. 1214 (34 S. W. 227).[1]

The court then said, at page 239:

Although there are some cases in Texas and Mississippi holding otherwise, we think

[1] None of these cases except *Taylor* v. *Commonwealth*, *supra*, is in point upon "silence at a preliminary examination." They sustain the rest of the paragraph, however.

this is a resonable construction of the statute and the use to be made of it. The statute was passed for those who do not care to become witnesses in their own behalf and not for those who do. When a defendant testifies in his own behalf this statute has no application; it is the same as though the statute had never been passed. The idea behind the statute was to prevent a presumption of guilt being created by reason of the fact that defendant did not testify. If there were any such presumption in the minds of the jurors in this case before defendant offered himself as a witness the moment he did so the presumption would at once be dissipated and the fact that he had refused to give testimony on the preliminary examination would be of no consequence. To say to the prosecutor in one breath that when defendant takes the stand he may cross-examine him the same as any other witness; that he may cross-examine him with reference to every conceivable material thing, and then in the next breath say to him if he asks the defendant whether he was a witness at the preliminary hearing it is a violation of the statute and reversible error is, to say the least, not very consistent. We are in accord with the construction suggested by *Taylor* v. *Commonwealth*, *supra*, and therefore conclude that the trial court was in no error when he instructed the jury that defendant had, by becoming a witness, waived the benefit of the statute.

Taylor v. *Commonwealth*, 34 S. W. 227 (not officially reported), was decided February 6, 1896, by

the Kentucky Court of Appeals. The appellant had been convicted of manslaughter. The court, in a unanimous opinion, said:

> It was also objected that appellant was asked why he did not testify upon the examining trial; and it is claimed this was in violation of section 223 of the Criminal Code, providing that a defendant's failure to testify "shall not be commented upon or be allowed to create any presumption against him." We think this provision is restricted to the trial and tribunal in which the failure to testify occurs, and that when he takes the stand as a witness he may be subjected to cross-examination touching his credibility as any other witness.

This case is not in harmony with other Kentucky cases considered, *infra*.

Sanders v. *The State*, 52 Tex. Criminal Rep. 156, was decided November 20, 1907, by the Texas Court of Criminal Appeals. Sanders had been convicted of violating the local option law and upon trial had testified in his own behalf. There had been two previous trials for sales from the same case of beer, at the same time, to different parties. Defendant was convicted in one case and appealed. In the other case a new trial was given. He had not testified on the other trials. On this trial he was asked on cross-examination, in substance, if it were not the fact that one Rountree, then dead, had, on two former trials testified that he, Rountree, did not receive any money from, or deliver beer to, one Howard, but that the defendant Sanders delivered

it to Howard, and if it was not the fact that he, the defendant, did not take the stand as a witness and deny the statements of Rountree. Upon appeal it was urged that the defendant in a criminal case may not be called upon to testify, and his failure to testify can not be taken as a circumstance against him, nor be referred to by State's counsel in any manner, and if on a subsequent trial of said cause the defendant should take the stand, he can not be called upon and required to answer questions touching his failure to take the stand in former trials. In overruling the objection the court said, page 158:

> We have not the benefit of brief, or authorities in support of these grounds or contentions, but as this bill presents the matter, we are of opinion that there is no error. It seems from the facts in the case, as well as from the statement in the bill of exceptions, that there had been some bottles of beer sold by appellant to different parties, all coming out of the same box; and at least, that three prosecutions grew out of these sales, this being one, a new trial having been granted in one, and a conviction and appeal in the other. Rountree, it seems, was a witness in the other two cases when tried and had died, therefore not used as a witness in this case. Defendant did not testify in the former trials, but after Rountree's death, testified in this case.
>
> We are of opinion that it was legitimate to prove that he had not testified in the other cases. They were closely identified with this case, growing out of the same transaction and

> it was a legitimate attack upon his testimony in this case, that he had waited until the death of the State's witness, Rountree, before testifying. We have not found this direct question adjudicated, but we are of opinion that it was a legitimate way of impeaching appellant's testimony. The statute inhibiting a reference to the failure of defendants to testify, refers to a case on trial in which he had not testified. That ground of objection could not apply here, because appellant took the stand and testified.

This case is not in harmony with other Texas cases considered *infra*.

Texas

In Texas, though *Sanders* v. *The State*, 52 Tex. Crim. Rep. 156, apparently has not been in terms overruled or distinguished, the question seems to be settled to the contrary by a line of decisions.

In the case of *Richardson* v. *The State*, 33 Tex. Crim. Rep. 518, decided in 1894, Richardson had been convicted of murder in the second degree. It was the second appeal following the third trial. Appellant was a witness on the last trial, but was not on either of the former trials. Counsel for the State proved by the accused that he had already been convicted twice, and argued to the jury that "24 citizens of this county" had said he was guilty. This in face of Article 783 of the Code of Criminal Procedure providing that a "former conviction shall be regarded as no presumption of guilt, nor shall it be alluded to in the argument." In addition,

Article 770 of the Code of Criminal Procedure, giving the defendant the right to testify, contained the provision that "the failure of any defendant to so testify shall not be taken as a circumstance against him, nor shall the same be alluded to or commented on by counsel in the case." In reversing the judgment of conviction and giving Richardson a fourth trial, the court said, at page 519:

> Well, our statute (Code of Criminal Procedure, article 783), expressly declares the former conviction shall not be alluded to in the argument. Appellant being on the stand, the State, over his objection, proved by him that there had been two former trials, and that appellant had not been a witness in either of those trials, and counsel for the State alluded to the fact that he had not testified on the former trials. The act giving the defendant a right to be a witness in his own behalf expressly provides, that the failure of defendant to testify shall not be alluded to or commented on by counsel in the case. The question is, does the statute refer to the failure to testify on the pending trial, or does it prohibit counsel from alluding to or commenting on the failure of defendant to testify on the former as well as the present trial? The defendant has the right to testify or not, as he chooses. Whether he does or does not is no concern of the State, or of any person except himself. The statute is broad, and does not confine the inhibition to commenting on or alluding to the failure to testify on the pending trial. The reasons for

> the inhibition are as cogent in the one case as the other, and we are of opinion that the statute covers both.

There was no discussion of the principle of waiver or citation of authorities. The decision rests upon the court's construction of the two provisions of the Texas statute. In view of the provision of Article 783, the argument of the District Attorney was highly improper and justified a reversal of the judgment. Possibly the provisions of Articles 770 and 783, taken together, justified the conclusion of the court that reference to the failure of the defendant to testify on the two former trials was prohibited. Nevertheless, in Texas the defendant's testimony on a former trial may be used against him (*Luttrell* v. *The State*, 70 Tex. Crim. Rep. 183; *Henry* v. *The State*, 87 Tex. Crim. Rep. 148), and when the defendant has testified on a former trial but does not testify at the second trial, evidence of his testimony on a former trial is admissible, though its admission might virtually compel him to take the stand in his own behalf. *Wooley* v. *The State*, 64 S. W. 1054, Texas Court of Criminal Appeals, 1901, not officially reported.

In *Brown* v. *The State*, 57 Tex. Crim. Rep. 269 (1909), the court held that it was reversible error for the District Attorney to ask the defendant whether this was the first time he had testified in the case, following what the court deemed to be the settled law of the State, citing cases; and further holding that the statute was mandatory and that the error could

not be cured by the court's instruction to the jury to disregard the proof and pay no attention to it. The court said, at page 276:

> That in no case where a plea of not guilty is entered, it is ever competent at any time or under any circumstances to make proof that appellant did not testify or that he had failed to testify on a former trial of his case.

No reference was made to the *Sanders case*, decided two years before, in which Presiding Judge Davidson had written the opinion, although he was a member of the court which decided the *Brown case*.

Eads v. *The State*, 66 Tex. Crim. Rep. 548, and *Swilley* v. *The State*, 73 Tex. Crim. Rep. 619, are to the same effect. They do not, however, discuss the question upon principle but follow prior cases as having settled the law.

Kentucky

In *Parrott* v. *Commonwealth*, 47 S. W. 452 (Kentucky Court of Appeals 1898, not officially reported), the court held that it was error to permit the prosecuting attorney to comment in his argument on what occurred at the examining trial, *there being no evidence as to that matter*. Not resting its decision there, however, the court went on to say, after quoting the statute, at page 453:

> This, in our opinion, applies equally to a failure to testify on the examining trial as before a trial jury; for, if it did not, an accused could not testify on an examining trial. So, in either case, the statement of prosecuting

> counsel was prejudicial error denounced by statute.

In that case defendant had testified in his own behalf. The Court did not discuss the question upon principle, or refer to its own decision two years before in the *Taylor* case (*supra* p. 20), although five of the judges who decided the former case sat in the latter.

In *Tines* v. *Commonwealth*, 77 S. W. 363 (Kentucky Court of Appeals, 1903, not officially reported) the jury had been instructed that they should not comment upon the failure of the defendant to testify nor draw any presumption of his guilt from such failure. The court held this to be error, saying, at page 364:

> The jury's mind was thus directed to the fact that appellant had not testified in his own behalf, and no comment by the Commonwealth's attorney could have been more injurious to his interests than was done by this instruction. The court, by the instruction in question, did appellant the very injury which it is the object of the law to prevent. Appellant was entitled to absolute silence on his failure to testify in his own behalf.

The Kentucky statute, Section 223 of the Criminal Code, Paragraph 1, provided that the failure of defendant to testify "shall not be commented upon, or be allowed to create any presumption against him or her." This case, of course, has no direct bearing upon the question we are now examining. It shows, however, an extreme view of the general subject. Can the court have believed that any jury would fail

to notice the obvious fact that the defendant did not take the stand, or fail to draw an inference therefrom unless instructed not to? The question has been decided the other way in Texas. *Guinn* v. *The State*, 39 Tex. Crim. Rep. 257.

In *Newman* v. *Commonwealth*, 88 S. W. 1089 (Kentucky Court of Appeals, 1905, not officially reported), Newman had been convicted of murder. Upon appeal many errors were urged and some eight were sustained. Among them one is thus stated in the syllabus:

> Under the statute providing that the failure of defendant in a criminal prosecution to testify in his own behalf shall not be commented upon, the prosecuting attorney has no right to refer to defendant's failure to testify as a witness upon an application for bail.

The defendant upon the stand had been asked by the Commonwealth's attorney many questions which were clearly improper. He was also questioned as follows:

> Q. At the May term of this court, 1904, you made application for bail, did you not?
>
> A. Yes, sir.
>
> Q. Did you not testify as a witness upon that application?
>
> A. No, sir.
>
> Q. Why didn't you testify if you had nothing to do with the killing of that man?
>
> (The defendant's objection to this question was sustained.)

There were many other questions to which no objection was made. In its opinion the court said, at page 1092:

> While there were no exceptions taken to the questions above indicated, except as quoted, it was misconduct on the part of the commonwealth attorney to ask them. When the defendant is sworn in his own behalf, in a criminal case, he is to be treated on cross-examination as any other witness, and it is very improper for the commonwealth attorney to insinuate in cross-examining him that he is swearing an untruth or would swear an untruth. The mode of cross-examination followed by the commonwealth attorney was calculated simply to discredit the witness before the jury. It was improper for the attorney to indicate what the people generally thought or said about the defendant's being jealous of Bryant. The defendant is entitled to a fair trail on the evidence heard before the court, without any reference to the sentiment of the community. It was improper for the attorney to refer to the fact that the defendant did not testify as a witness upon the application for bail. The statute which allows the defendant to testify in his own behalf in a criminal case expressly provides that his failure to testify shall not be adverted to, and this clause of the statute applies no less to previous trials than to the one in progress. * * * *While we would not reverse the judgment for the conduct of the commonwealth attorney, which was not objected to, and might not reverse for the admission of the evidence which was objected*

> *to, if the proof was clear as to the defendant's guilt and the trial was otherwise fair,* still the evidence was prejudicial, and being given undue weight by the matters indicated, may have had great effect upon the jury. In view of the inconclusiveness of the evidence against the defendant, and in view of the conduct of the commonwealth attorney in asking the questions above referred to, we can not say that the defendant has had a fair trial, or that upon the whole case there was no substantial error to his prejudice. (Italics ours.)

There seem to have been many grounds for a reversal of the judgment, culminating in a conclusion that the defendant had not had a fair trial and that the evidence against him was inconclusive.

Tennessee

In *Smithson* v. *State*, 127 Tenn. 357, the second time the case had been before the Supreme Court, it appeared that there had been three jury trials as well as a committing trial before a justice of the peace. On the third trial the State's Attorney asked the defendant whether at the committing trial or at any time before the second jury trial, he had ever publicly said he killed the deceased, but did it in self-defense. In answer to his own counsel he explained that on the preliminary examination and the first trial he introduced no testimony. Counsel for the State argued to the jury that on former trials the plaintiff in error was afraid to go on the stand; that his counsel had no faith in his

defense and were ashamed to put him on the stand. To this, objection was made and a motion to exclude it from consideration by the jury. The trial judge did exclude it, but in doing so said that, in his opinion, the argument was legitimate. This was held to be manifest error. The court held that the policy of the statute was to protect the defendant against argument based on his failure to take the stand, whether that failure occurred in the immediate trial or on a former trial, and said, at page 361:

> To hold otherwise would be to put on a defendant the hazard of foreseeing in the earlier trial the effect in a subsequent trial of such failure; whereas the policy of the statute is to protect him in the trial in which he is first put to his election, as well as in a later trial.

So Smithson got a fourth trial. The court cited as authorities *Taylor* v. *Commonwealth*, 117 Ky. 214; *Bunckley* v. *State*, 77 Miss. 540; *Brown* v. *State*, 57 Tex. Crim. Rep. 269.

We have been unable to find the case of *Taylor* v. *Commonwealth*, 117 Ky. 214. The citation given is incorrect. The only *Taylor case* in Kentucky bearing upon this question which we have found is *Taylor* v. *Commonwealth*, 34 S. W. 227, already discussed and which holds the other way.

In *Bunckley* v. *State*, 77 Miss. 540, one of the cases relied upon by the Tennessee court in *Smithson* v. *The State*, *supra*, a prosecution for stealing hogs, n the trial the prosecuting witness testified that

there was a preliminary trial of the case and the defendant did not there or at any time make any explanation of his possession of the hogs. That the district attorney called the attention of the jury to the fact that the defendant, upon the preliminary examination, did not take the witness stand and remove the inference of guilt, which might be predicated, of his being found in the possession of the property recently stolen, was held to be prejudicial error. *It does not appear that the defendant took the stand.* Apparently he did not. There was no discussion of the principle of waiver or cross-examination, and the decision was based upon the Kentucky case of *Parrott* v. *Commonwealth*, 47 S. W. 452 (*supra*, p. 25).

Brown v. *State*, 57 Tex. Crim. Rep. 269, the other case relied upon by the Tennessee Court, has already been referred to.

The reasoning of the Tennessee court is not impressive. Where is the vice of putting upon the defendant the "hazard" of foreseeing in the first trial the effect in a subsequent trial of his failure to testify? Of course, there may be but one trial. He may be acquitted and that will be the end of it. He may be convicted and his conviction sustained. Why should the State be particularly solicitous to see that he is in no way tramelled in jockeying for position or subjected to any risk if he makes a mistake? The object of an indictment is not to give the defendant successive and safe opportunities

to experiment with varying means of preventing conviction. The defendant can not be required to testify. It is optional with him. When he exercises his option he takes all the chances which naturally flow therefrom, even though the outcome may show that his choice was unwise. The purpose of the trial is to determine the fact of guilt or innocence, not to multiply chances for defeating that purpose.

Mississippi

In Mississippi it has been held error to allow the State to ask the defendant, when testifying in his own behalf, whether he had testified in his former trial. *Smith* v. *State*, 90 Miss. 111. The court said, page 116:

> The question to defendant, as a witness, whether he had ever testified, was improper, and equivalent to a comment to the jury on his non-appearance as a witness on the previous trial of the case. By all our adjudications this is sacred ground.

Citing *Yarbrough* v. *State*, 70 Miss. 593; *Sanders* v. *State*, 73 Miss. 444; *Reddick* v. *State*, 72 Miss. 1008. These cases all related to comment upon the failure of the defendant to testify upon the trial then in progress, and involved flagrant violations of the statute.

See also *Bunckley* v. *State*, 77 Miss. 540 (supra, p. 30).

Of all these cases the only ones in which the question has been considered upon principle are

Commonwealth v. *Smith*, 163 Mass. 411; *People* v. *Prevost*, 219 Mich. 233; *Taylor* v. *Commonwealth*, 34 S. W. 227, and *Sanders* v. *The State*, 52 Tex. Crim. Rep. 156.

Recognizing the principle that when the defendant in a criminal case takes the stand he waives his constitutional immunity to self-incrimination and his statutory immunity to criticism for not taking the stand, and may be cross-examined or impeached as any other witness, including examination or impeachment upon matters tending to affect his credibility, they hold that it is competent to question him or refer to his former failure to testify as that fact may have a bearing upon the credibility of his present testimony. The *Massachusetts* and *Michigan cases* go into the matter thoroughly. The Kentucky court in the *Taylor case*, though not discussing the question elaborately, points out the true principle when it says that when the defendant takes the stand "he may be subjected to cross-examination touching his credibility as any other witness."

The Texas court in the *Sanders case*, too, goes instinctively to the real point when, without the benefit of brief or authorities, it sees clearly the permissible inference to be drawn from the silence of the defendant on two trials broken only after the accusing witness had died.

The cases holding to the contrary, which we have cited, may be summarized as follows:

In *Richardson* v. *The State*, 33 Tex. Crim. Rep. 518, the question was decided upon the Texas statutes

without discussion of principles or the citation of authorities. Thereafter, except in the *Sanders case*, the law was deemed settled. In Kentucky, starting with *Parrott* v. *Commonwealth*, 47 S. W. 452, the principle was announced in a case in which the court held that it was error for the prosecuting attorney to comment in his argument on a matter *concerning which there was no evidence before the court.* What the court said thereafter may well be regarded as dicta, and there was no discussion of principle or any reference to a prior decision of the same court, which had been decided upon correct principles; this was followed by the *Tines case*, 77 S. W. 363, going to the extreme of holding that the court could not even charge the jury upon the law in accordance with the statute; and by the *Newman case*, 88 S. W. 1089, a case full of error and decided really upon the ground that the defendant had not had a fair trial and that the evidence against him was inconclusive. In Tennessee, in *Smithson* v. *The State*, 127 Tenn. 357, *a case in which the defendant did not take the stand*—hence, no waiver—the court, without considering the question as one of principle, followed the *Brown case* in Texas and the *Bunckley case* in Mississippi. In Mississippi, the *Bunckley case*, 77 Miss. 540, followed the *Parrott case* in Kentucky, without discussion of the principle, and thereafter in *Smith* v. *The State*, 90 Miss. 111, the court, without examining the question, said that "by all our adjudications this is sacred ground," citing as authority

its own previous decisions in cases which did not involve the principle at all.

On principle, therefore, the questions asked of Raffel in the certified case were competent upon the question of his credibility, and solely upon that question. We would not claim that his failure to testify on the former trial could be treated as an admission, or would create a presumption of guilt. The question is the narrow one whether his failure to deny the statements made by the prohibition agent, that he had admitted being the owner of the place raided, had any bearing upon the truth of his present denial of the agent's testimony, that is, though competent, was it relevant or material? That question, as it seems to us, can hardly be answered without knowing more of the case than is shown in this record. It looks like a rather trivial matter. When one is found in apparent proprietorship of an illegal resort and is charged by an officer with being the owner, the natural thing for an innocent man to do is to deny it. If thereafter the officer says that he admitted being the proprietor, and he fails to deny it, the natural inference is that the officer is telling the truth. If, again, the officer makes the same statement and he does deny it, his former silence, taken in connection with other facts in evidence and allowable inferences therefrom, may cast a substantial doubt upon his present truthfulness.

We assume that the ownership of the place was the fact in issue and the case does not show us the state of the evidence upon that issue. The record

does not show definitely that upon the stand Raffel denied being the owner of the place, only that he denied admitting ownership. If his testimony was that he was not the owner, his previous failure to deny admitting ownership would seem to be a circumstance bearing upon his credibility. No jury, however, which was disposed to believe him when he said he was not the owner, would probably have their minds changed by the fact that he had not, on the former trial, denied the statement of the prohibition officer. On the other hand, if all he denied was that he had admitted ownership, the jury in all probability would regard his defense as a mere quibble confirmed to some extent by his failure to deny on the former trial, particularly if the officer had made a favorable impression.

The certified question means, of course, was the admission of the evidence *reversible* error?

By the Act of February 26, 1919, c. 48, 40 Stat. 1181, Section 269 of the Judicial Code was amended to read as follows:

> All of the said courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law. On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or excep-

> tions which do not affect the substantial rights of the parties.

Upon the record now before the Court, all we can say is that on principle the evidence shown was not incompetent. What conclusions might be drawn from it would ordinarily be for the jury to decide. Compare *Commonwealth* v. *Goldstein*, 180 Mass. 374. At most its bearing was slight and to be restricted to its proper relation to the rest of the evidence. Even if incompetent the error may be cured by suitable instructions to the jury. *Wilson* v. *United States*, 149 U. S. 60. However this Court may view it, if in all other respects, "after an examination of the entire record" the guilt of the defendant seems clear and the trial fair, the matter certified does not present reversible error. This is apparently the situation, for the Circuit Court of Appeals says:

> The case must therefore be affirmed, unless there was error in this respect.

III

The question should be answered in the negative or the Court should decline to answer it on the ground that the proper answer requires an examination of the whole case.

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